In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 673

SAMUEL R. SNYDER, ADMINISTRATOR OF THE ESTATES OF RENEE DENISE SNYDER AND KAYE ERIN SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court in these and related cases is reported at 118 F. Supp. 585 (R. 94–106). The *per curiam* opinion of the Court of Appeals (Pet. App. 41–48) is reported at 218 F. 2d 266.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 28, 1954 (Pet. App. 49). The petition for a writ of certiorari was filed on March

25, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a court of appeals may review an award of damages in a federal tort claims action notwithstanding that a motion for new trial on the ground of excessive damages was not filed.

2. Whether the scope of review of a federal tort claims damage award is governed by Rule 52 (a), Fed. R. Civ. P., or whether it is limited by the same standards that govern review of a denial of a motion for new trial directed at jury findings of damages.

3. Whether on the facts of this case the Court of Appeals arbitrarily and without authority reduced the trial judge's award of damages on the ground that it was clearly erroneous.

RULE INVOLVED

Rule 52 (a), Fed. R. Civ. P., provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Findings of facts shall not be set aside unless clearly erroneous * * *.

STATEMENT

On the morning of April 8, 1951, a B–25 military bomber plane of the United States Air Force left Andrews Field in Prince Georges County, Maryland, on a test flight with pilot, co-pilot and engineer aboard. When the plane attempted to return to the field after the flight, it was discovered that the landing gear had jammed with one wheel up and the other wheel down, making it impracticable for the crew to make either a normal or a crash landing. For about four hours many attempts were made to overcome this difficulty by diving, fluttering, and improvising hydraulic fluid, but none of the attempts was successful. When the gas supply was running low, the pilot was directed by Air Force officers in the tower to fly over the field, to permit his crew to bail out, and, after setting the plane on a heading that would take it over Chesapeake Bay, to abandon the plane. Simultaneously, orders were issued for two jet fighter planes to pursue the abandoned bomber and shoot it down over the bay. (R. 94–6.)

Because of a malfunction in the plane's instruments after it was abandoned, the plane began to circle instead of continuing on course and finally crashed into a housing development at Morningside, Maryland, near the field. The plane struck the house of petitioner and set it on fire. As a result of the accident, petitioner's two little girls, Renee Denise Snyder, age eight weeks, and Kay

Erin Snyder, age six and one-half years, were killed, and Sgt. and Mrs. Snyder were injured. Petitioner's sister, Mrs. Guyer, was also injured and her husband was killed. (R. 94–6.)

Actions under the Federal Tort Claims Act were brought against the United States by the Snyders for their personal injuries and for property loss, by Mrs. Guyer for her injuries and for the wrongful death of her husband, by the administrator of Mr. Guyer's estate for Guyer's pain and suffering and for funeral expenses, and by petitioner, as administrator of the estates of his two children, seeking a total of $50,000 for wrongful death of the children and for their funeral expenses. (R. 3, 7.) Admitting liability, the Government contested only the amounts sought as damages. (R. 96.) After hearing evidence, the District Court awarded to the Snyders $29,850 for personal injuries and $10,604.76 for property loss, to Mrs. Guyer $164,311.89 for personal injuries and for the wrongful death of her husband, to Mr. Guyer's administrator $6,446.23 for pain and suffering and for funeral expenses, and to petitioner $8,000 plus $147.50 for the death and funeral expenses for each of the two children (R. 107–114).

Without moving for a new trial, the Government appealed to the court below, contending that each of the awards was excessive and clearly erroneous and, in addition, that in the two cases involving the children the evidence justified awards of only nominal damages. Ruling that

its review was to be under the "clearly erroneous" standard of Rule 52 (a) of the Federal Rules of Civil Procedure, *supra*, p. 2, the Court of Appeals found excessive the awards to Mrs. Guyer and to petitioner and reduced them from $164,311.89 to $105,561.89 and from $8,147.50 to $5,147.50 for each child, respectively (Pet. App. 44–46, 47). The court upheld the judgments in the other cases (Pet. App. 46–47, 47–48).

ARGUMENT

In this case, petitioner seeks review by this Court only of the action of the court below in reducing by $3,000 the trial court's awards to petitioner for the deaths of each of the two children.[1] Such review is unwarranted since (a) the decision below is in accord with well-founded principles; (b) it is based upon the particular facts of this case and therefore would have little application to other cases, and finally, (c) if any error was committed, it was in favor of, rather than against, petitioner.

1. It is no longer open to question that the scope of review by federal appellate courts of findings of fact made by a judge sitting without a jury is much broader than that of a jury's findings. Rule 52 (a), Fed. R. Civ. P.; *United States* v. *United States Gypsum Co.*, 333 U. S. 364; 5 Moore, *Federal Practice*, 2609–2616. If a "reviewing court on the entire evidence is left

[1] The time for filing a petition for a writ of certiorari in the *Guyer* cases has now expired.

with the definite and firm conviction that a mistake has been committed," it may set aside a federal trial judge's findings of fact even if there is evidence to support them. *United States* v. *Oregon Medical Society,* 343 U. S. 326, 339; *United States* v. *United States Gypsum Co., supra,* at 395. No reason is suggested by petitioner, and we believe there is none, why this principle does not apply to findings of damages in a tort action in the same way as it applies to all other findings of fact. *U. S. A. C. Transport* v. *Corley,* 202 F. 2d 8 (C. A. 5); *United States* v. *Grigalauskas,* 195 F. 2d 494 (C. A. 1); *Sanders* v. *Leech,* 158 F. 2d 486 (C. A. 5). Cf. *Universal Pictures Co.* v. *Harold Lloyd Corp.,* 162 F. 2d 354 (C. A. 9). This is the principle followed by the court below and clearly enunciated in its opinion (Pet. App. 44, 47). The court adopted no novel doctrine, and applied no rule of law inconsistent with any other federal judicial decision.

Petitioner urges that this clear and simple rule of review is limited in its applicability to findings of damages. According to petitioner, before an appellate court is permitted to review a finding as to the amount of damages, a motion for new trial must first be made on that ground to the trial judge; and upon such review the appellate court may set aside such finding only if an error of law was made in the award. No sound reason exists, however, for imposing these limitations. Moreover, none of the many cases cited by peti-

tioner in fact support his position.[2] On the other hand, in at least two cases the Fifth Circuit has applied the "clearly erroneous" test in reviewing damage awards and has done so although no motion for a new trial had previously been filed. *U. S. A. C. Transport* v. *Corley*, 202 F. 2d 8; *Sanders* v. *Leech*, 158 F. 2d 486.

Although the limitations pressed by petitioner are well-established in regard to review of findings of fact by a jury—and it may be noted that they are applicable to all findings and not merely to findings as to the amount of damages—these limitations and the reasons therefor do not have any application in a suit under the Federal Tort Claims Act, which has no common law foundation and which requires that the case be tried before a judge. The Seventh Amend-

[2] Petitioner contends that *Hutches* v. *Renfroe*, 200 F. 2d 337 (C. A. 5), and *United States* v. *Fotopulos*, 180 F. 2d 631 (C. A. 9), "have held that Rule 59 (a) of the Federal Rules of Civil Procedure requires the filing of the motion in such cases" (Pet. 26). Examination of these cases indicates that they make no such holding. In *Hutches*, a motion for amendment of judgment had been made and denied and the award of damages was then reversed, but the court nowhere stated that it would not have reversed had such a motion not been filed. Compare *Sanders* v. *Leech*, *supra*, and *U. S. A. C. Transport* v. *Corley*, *supra*, both also decided in the Fifth Circuit, where, as noted above, the award was reviewed though no motion had been made. In *Fotopulos* the court mentioned that no motion for new trial had been filed, but gave as its reason for refusing to set aside the award the fact that appellate courts will not review judgments for excessiveness of damages, "except under extraordinary circumstances." 180 F. 2d at 639.

ment to the Constitution precludes federal appellate courts from reexamining jury findings, wherever a jury trial is required, except in so far as they transgress law. Moreover, it is also reasonable orderly procedure to require as a prerequisite to seeking review in cases where the facts are found by a jury that the would-be appellant present to the trial judge his objections to those findings so that the judge may determine whether they are erroneous in law. This is because it is the judge's action, not the jury's, that must be reviewed. But where the trier of fact and the trier of law are the same person, and there is no constitutional right to a jury trial, it would be useless deference to mere form to require the filing of a motion for new trial on grounds that the judge has already considered and rejected.

2. Petitioner also argues that the reduction of damages by the Court of Appeals was arbitrary and unauthorized by law. But this action by the court was based on the facts of this particular case and at most involved the application of state law to these facts. Consequently, it does not raise any issue of general importance.

Moreover, the court correctly applied Maryland law which is here applicable by virtue of the state law reference contained in 28 U. S. C. 2674. Maryland law is clear that damages for wrongful death of a minor are to be measured by the pecuniary loss to the parents alone; no compensation may be had for grief, loss of companionship

or other non-pecuniary loss. Article 67, Section 1, Annotated Code of Maryland (1951 Ed.); *Assurance Corporation* v. *Balto. & O. R.*, 173 Md. 238; *State, Use of Coughlan* v. *Balto. & O. R.*, 24 Md. 84. The court below recognized the harshness of the Maryland wrongful death statute but nevertheless felt bound by it, stating (Pet. App. 47):

> Of course no decent parent would be willing to lose a child for this or any other sum of money; but this does not mean that he has reasonable expectation of pecuniary benefit from the child's life. Under the Maryland law here applicable it is only such pecuniary benefit that may be recovered.

Faced with this limitation, the Court of Appeals found itself unable to justify, on the record, a finding that the parents of the deceased children had suffered a pecuniary loss of $8,000 for each child.

The only evidence submitted by petitioner in an effort to show pecuniary loss consisted of a list of verdicts in other Maryland wrongful death actions involving children and testimony with respect to the current earnings of girls between the ages of 18 and 21 who have taken secretarial courses and are doing secretarial work.

As the court below held, the secretaries' earnings plainly had no probative value (Pet. App. 47), since, apart from the fact that there is nothing to show that the children would

have engaged in these particular occupations, their gross earnings must, of course, be reduced by the expenses incurred, and even this net figure, it would seem under the Maryland statute, should be reduced further to take into account the heavy expenses of maintaining the children until they would be in a position to support themselves. Likewise, the verdicts in other Maryland wrongful death cases is irrelevant, for the result in each obviously turned upon its own facts and there is no showing that the facts here are in any way similar to those on the basis of which these verdicts were entered. Thus, there plainly was no evidence to support the $8,000 award for each child's death and the error, if any, of the court below in allowing recovery of as much as $5,000 clearly was in favor of, not against, petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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